

Ireland, George III, King. etc. 2
THOUGHTS

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ON THE

LAW OF FORFEITURE

AND

PARLIAMENTARY ATTAINDER

FOR

HIGH TREASON,

AS APPLYING TO THE

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NOW DEPENDING IN PARLIAMENT.

NEC VERO ME FUGIT, QUAM SIT ACERBUM PARENTUM SCELERA
FILIORUM POENIS LUI: SED HOC PRÆCLARE LEGIBUS COMPARATUM
EST, UT CARITAS LIBERORUM AMICIORES PARENTES REIPUBLICÆ
REDDERET.

CIC. AD BRUTUM.

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ADVERTISEMENT

TO THE READER.

THE *haste*, with which the following considerations were thrown together, will in *some degree apologize* for their inaccuracy or incomprehensive view of their subject.— Could any ideas of mine affect the *life* of any man, they should never have seen the light; but since, far from being the warm advocate of *corruption of the blood* of attainted persons, I simply contend for the reasonableness of *forfeiture of property*, I shall, I think, be justified in the opinion of the *nicest* moralists, —it being considered that the object of the present bill is to deprive a *few* men of their forfeited property only to distribute it to *numbers* of others *who* have *suffered* by their *loyalty*.

THOUGHTS, &c.

A BILL is now preparing in the lower House, to attain of High Treason, *three* gentlemen, who, if the witnesses deposing to their treason are to be credited, deserved to have been rendered national examples. One of them has lost his life, in consequence of his *resisting* the arrest of the officers of justice—the other two have been tried by martial law, condemned, and executed. The object of the bill of attainder, exclusive of its being intended by the extensiveness of the punishment it inflicts, to deter others from the commission of the crime which provokes it, is, as it seems, by *confiscation* of
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the property of those gentlemen to endeavour to repair in part, the mischief they are *charged* with having caused to the property of the King's loyal subjects ;—many in, but more out of, Parliament, have conceived objections to its propriety, even admitting the guilt of those who are the subjects of attainder. The acts of the Legislature, though supreme, require sometimes to be reconciled to the public at large. The bulk of the people in every country, judge not from reason, but from their natural *feelings* ; and it requires some consideration in a man not in the habit of tracing the sources of things, to reconcile to himself the idea of pursuing a criminal in his *grave*, and seizing that property after his death, which that *event* by the laws of this country, would have bestowed upon his children or relations, supposing him to have died intestate. To point out to the consideration of the people of this country the grounds of the policy of such posthumous punishment, and to lay before them some examples of *similar* proceedings

ceedings of *former* parliaments in cases of *High Treason* committed, is the only intention of this Pamphlet. I am unconnected with any party, and am only anxious that the principle of the bill in question should be investigated with *coolness*, before the censure too often pronounced against all the measures of government *indiscriminately* shall fall upon this.

The public attention must *first* be drawn to the consideration of the propriety of *attainder* for *High Treason* in *any* case whatever ; and, if its *policy* shall be shewn ; the *next* obvious enquiry will be, as applicable to the *present* Parliamentary proceedings, whether Parliament can with *justice* *attaint* persons who have *died unattainted*.

Attainder for the crime of treason, is the consequence of a judgment of *conviction*, or of a judgment of *outlawry*, pronounced against one charged with such crime, by reason of his non-appearance to answer the charge.

It is best known from its *effects*, one of which is, that it confiscates the property of the traitor both real and personal to the state; and the *other*, that it *corrupts* his *inheritable* blood, so that neither his posterity nor collateral relations can inherit any land, nor succeed to any goods or chattels, the *title* to which they are obliged to *derive through him*; he is considered as *never* having had any civil existence, his name is as it were erased from the pedigree of his family; and his blood is said to be corrupted or *tainted*. This *taint*, or corruption of inheritable blood, is the most terrible effect of what is called *from it attainder*; and it is not surprizing, that from that *principal* effect the cause should be denominated.

I shall not take any *direct* notice of the attainder by judgment of *outlawry*, but only *judgments of conviction*, under which I shall comprize not only judgments in consequence of *evidence* given of the offender's guilt, but those given against him in consequence of
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his *confessing* his guilt or refusing to plead, whether pronounced by *courts of law* or by *acts of Parliament*, having the force and effect of legal judgments of conviction.

When I speak of *courts of law* as competent to pronounce judgment of attainder, I can only be understood to mean courts proceeding according to the *course of the common law, with the intervention of a jury*; for the *jealousy* of our law would not endow the judgment of any court proceeding *otherwise* with the power of *attaint*, which we have seen to be so terrible and *penetrating*. Thus, not even the judgment of the Lord *High Admiral* or of the *constable and marshall* of conviction of treason committed *on or beyond* the seas, could work the attainder of the convict; both the court of the admiral, and that of the constable and marshall, proceeding according to the *civil law*. So it has never been doubted that the sentence of a court martial, deriving its original from the court of the constable and marshall, could
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not, unless aided by act of Parliament, be endowed with such attainting qualities.

It may be seen, that I have put attainder by judgment of a court of *common law* and that by *Parliament* on the same footing; the parliamentary attainder working *no* greater consequences but *often less* as will be discerned hereafter. The observations then which I shall make on the propriety of attainder in general, will apply equally to both.

It is said, that attainder for treason is the creature of the *feudal* law, which has been long since justly reprobated; and it is *supposed* to have been the opinion of a celebrated judge in his commentaries, that as the legislature has already done away most of the principal oppressions of the *feudal* law, this doctrine of attainder (including *forfeiture*) should speedily be sent to attend them.

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But it must be recollected, that it is not *attainder* in general, but merely so far as it works *corruption of the offender's inheritable blood* with which that learned judge is displeased ; and that there is *another* consequence of attainder, namely *forfeiture to the crown* of the traitor's property on which he lavishes, not censure, but *encomium*. I am neither *able* or *willing* to enter the lists with that great lawyer in favour of that *corruption of blood*, which I do admit is principally founded on *feodal subtilty*.—But this I can venture to assert, that however it may be *adviseable* to save the corruption of blood in *parliamentary attainder*, the *present times* are not such as well to admit of its abolition in case *judgment of conviction* shall be given in *the ordinary course of law*.—If such corruption of the inheritable blood was thought necessary of old time, when the struggles were not, whether there should be any regular government or rational law ; but who should reign, whether a branch of this or that particular *family*, how much more should such penalty now be held out
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when the effort of treason is to overturn the long tried system of European wisdom, and to substitute anarchy for order, and false philosophy for true religion ?

The fashion of modern times has been to decry the system of the feudal tenures, to represent it as a badge of slavery, but it is remarkable, that as far as it regards the doctrine of *escheats*, the father of the corruption of blood, we hear no great complaint of it from our ancestors. Escheats are not enumerated in the list of grievances presented by the Barons of old and redressed by the *great charter*, although *they* must have been principally affected by it, holding *immediately* of crown.

The feudal law is holden by the better opinion to have been a law of liberty, and introduced into England by universal consent, in the 15th year of William the first—but now—“ the age of chivalry is gone.”

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The law of *forfeiture* for treason stands on a footing very different from that of *corruption of blood*, and great is their mistake indeed, who imagine *forfeiture* to be a fruit of *feudal* tenure, or that any *lawyer* could have confounded it with the corruption of blood.

It is true they have been *sometimes* confounded together, and because one is of *feudal* parentage, the other is presumed to be its *twin* brother, and to have descended from a common ancestor ; but, if we examine their pedigree, we shall discover them to be of *different* houses, though usually attendant on the *same* chieftain.

The law of forfeiture of the offender's lands and chattels for High Treason is of *Saxon* origin and founded on reason, it had existence long before the *Norman conquest* and the consequent introduction of the feudal tenure :—but, in the Saxon law no corruption of blood impeding the descent *through* the convicted

traitor, no *escheat* after judgment of felony can be traced.

The nature of the *feudal* relation between Lord and Vassal was such, that as the Vassal held the feud under the *condition* of *fealty* and good behaviour, if he refused to do fealty, or did any thing against it, such as committing *felony* (which *general* name formerly comprised treasons) the Lord might again resume his feud, and the inheritable quality of the Vassal's blood was *corrupted* and gone. — Thus, were the law of forfeiture of *feudal* origin, the traitor's lands on his attainder would naturally have fallen in and reverted to the Lord of whom they were holden ; but we find that not to be the case, for the King whether he were or were not the Lord of whom the lands were *immediately* holden, always became seized of the inheritance of the attainted person.

Another reason proving the penalties of forfeiture and corruption of blood to be founded

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ed on distinct principles, is, that though the crown may by pardoning the convict remit the *forfeiture*, nothing but *parliamentary interference* can *fully* do away the corruption of blood which was *originally* chiefly introduced for the *private* advantage of the feudal Lord:—for, it is a maxim of the common law that though the King may renounce his own rights, he cannot do away those of a subject.—The consequence then of a common law attainder is, that in case of a conviction of treason, the offender's lands would revert to the Lord of the fee, were it not that the law of forfeiture, founded on the crown's prerogative, giving a right more ancient than the feudal claim of the Lord, entitles the crown to the traitor's lands, and is *paramount* the title of the Lord by *escheat*.

The forfeiture, after it has operated on the lands which belonged to the traitor at *the time* of his offence committed, and judgment thereon, ceases to act, but there the *feudal* corruption of blood *begins*, by escheating to

the Lord the convict's *after* acquired property, and by preventing his heirs from entitling themselves *through* him.—On this distinction several statutes creating *new* treasons have been framed attainting the traitor, but *expressly* providing against corruption of his blood; and the construction of such statutes always has been—that notwithstanding the traitor should forfeit his lands and chattels, as if such provision had not been made; evidently demonstrating such corruption of blood, though *denominating* the attainder, not to compose its *essential* part.—But I can find no instance of any statute corrupting the offender's blood and saving the forfeiture.

In considering then, the propriety of that consequence of attainder, namely, forfeiture, which I think founded on political justice, it appears not to be disputed, that there is no hardship in taking from an offender standing unconnected and *alone*, who breaks his part of the compact between the sovereign of a state and the people, that property he has acquired

quired and kept under the guarantee of the state; but it is said, where is the equity of visiting his crime on his children or relations not implicated with him?—It cannot be denied, that the crime of treason against the state is the *greatest* any member of *civil society* can commit, and that therefore its punishment should be the greatest.—If there be any man now capable of vindicating the late *sanguinary* conspiracy between certain of the subjects of this realm and those successful destroyers of mankind styling themselves the *great nation*, to him I do not address myself.

Too many guards could not have been placed against the crime of treason; and as many men of *desperate* and *daring* dispositions who, whilst under the influence of violent passions, are *careless* of their *personal safety*, have notwithstanding a tenderness for their wives, offspring, or near relations; it was originally and truly thought that such tenderness might deter them from traitorous enterprises, and therefore the punishment of treason

treason was made to extend *beyond the criminal himself*.

The English law of forfeiture, says a celebrated writer,* was originally suited to the genius of a gallant and *brave* people, who, regardless of their *own lives*, were only to be restrained from disturbing the state by the *pledges* they left *behind* them : It was therefore the height of political wisdom in the early law to lay hold of the natural feelings, and the partialities of mankind for their offspring and their wives, no matter whether such partialities arose from instinct, vanity, or morality.

It may be said that the number of those whose family tenderneſſes would induce them to reflection, before they embarked in the treason, can be but ſmall, for that *few* men weigh *future* conſiderations in a juſt balance ; but even admitting that to be the fact, ſtill
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* Conſiderations on the Law of Forfeiture.

if a *few* can be deterred from the commission of such crimes it is some reason against the *abolition* of the *forfeiture*. Those *few* most probably would be men of property, and of some *repute* in the world from their social habits, and from their domestic attachments capable of *influencing* their family and relations : Such men as those, are necessary instruments in the hands of traitors to give a colour to the infancy of their cause ; and it is a greater matter gained to prevent such from facing the garment of rebellion. Such men also, if unwarily drawn in, and afterwards from discovery of their crimes in the *power* of the government, are more easily induced than others, by considerations of their *domestic pledges*, to *unravel* the conspiracy in which they engaged ; and of this we need not look to *history* for examples.

Thus, even were a *few only* to be deterred (which I by no means admit likely to be the case,) was any thing more fair and natural than for legislators to try whether natural feeling

feeling and partiality, from affection or passion, would have more power than *cool reason* which should dictate contented submission to the laws, or than *convenience* which prompt to preservation of property by not hazarding the ruin of *established order*?

Can that feeling be called slight in its operation which has so frequently induced *suicide* before judgment of conviction pronounced, in order by avoiding attainder to preserve the criminal's property for his children? From what other motive have so many, indicted for *felony*, obstinately stood *mute*, refusing to plead to the indictment?—The story of *Licinius Macer*, taken from *Valerius Maximus*, and which has been noticed by several writers on the penal law, is not improper to be here inserted. The historian informs us, that finding, at the conclusion of his trial, judgment was about to be pronounced against him (though not extending to death) he stopped his breath with his handkerchief

handkerchief and expired—and that he thus saved his estate to his son.

It has been by some imagined that forfeiture of the offender's property is unjust to his offspring, who, it is supposed, have a *natural* claim to inherit—but, it will scarcely be at this day contended that the right of retaining property, much less of transmitting it to others, particularly *after the death* of the acquirer, is a *natural* right; and if it be not, *honours*, titles, and privileges, above other men, cannot certainly boast of Nature as their grandame. It is not my intention or inclination to go into a metaphysical enquiry, into the origin of the rights of property—but, it may not be improper to observe, that, if the right of succession to property were a *natural* one, property would be *unalienable* by its possessor, that *all* his offspring, nay, even *all* his relations, if he died without issue, might claim an *equal* division of it; that the claims of *legitimate* and *illegitimate* children would be parallel, as also

those of the *elder* and *younger* children, nor should the males be preferred to the females in the succession of lands ; and that the laws of the kingdoms of the earth would not differ so widely in their rules concerning it, as we find they do. The laws of property in different states undergo various modifications, and manifest their *human* origin ; and we find that almost all nations, particularly those most priding themselves in the preservation of man's natural rights, have encouraged alienation of property ; and by the English law a man seized of lands of inheritance, or possessed of them for a term, may alien them under certain forms. The retaining and transmission of property then, is clearly the *creature of civil society* ; and if that be conceded it seems absurd to say, that the rights of property, originating from the *indulgence* of civil society, may not be conferred on *such terms* as shall bind the possessor to the civil duty he owes to the state conferring it, and for the *breach of that duty* be liable to *forfeiture*. Life and liberty are the gifts of
nature,

nature, and children should never be deprived of them for the offence of their parent, but the laws of property, are of *civil* institution, and not instituted merely for the childrens benefit, else, as I said, that property would be unalienable except during the possessor's life.—If the offender's property has not been settled on his children, they can have no rights but *from* their father, in case he holds the property *till he dies*, and therefore no injury can be said to be done to them, if he be *justly* deprived of it for his mal-practices, no more than if he had *conveyed it away*—and what is forfeiture but *one mode of alienation*?

There is no punishment an offender can sustain which does not in some degree go *beyond himself* to some friend, relation, or connexion; and if that were an objection, scarcely any punishment could be rationally inflicted. Even a pecuniary *fine* would by lessening the offender's means of subsistence distress his family:—Imprisonment often deprives a criminal of the means of supporting his wife and

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children ; and lastly his death, a matter of smaller moment with the modern theorists, carries with it consequences to his widow and his offspring, which it would be mockery to compare with the loss of his property.

The execution of a criminal is of *fleeting* example, but the forfeiture of lands leaves a *permanent* impression, and therefore has been enacted by almost every nation under heaven, and the crime of the father has been visited on the children ; it has remained for the French republic alone, that boasted preserver of the rights of man, to visit *those of the children on the father*.

It has been observed, by some writers, that such forfeiture seems to perpetuate a deadly feud against the state : That the descendants of a traitor, finding themselves deprived of the property of their ancestor without any guilt of their own, naturally contract an antipathy against the government which has in their opinion treated them with

so much cruelty, and that we can never persuade the innocent son that the good of society requires him to suffer for the crimes of a guilty father.

This argument assumes too much if it means to say that the son of a guilty father, though not perhaps actually committed to the treason, is in general free from the dangerous principles of his sire—on the contrary *if any presumption* is to be made, it should rather be this, that the father's conversation and company might have had an improper effect on his children—can we more easily persuade a son that the welfare of society required him to be made an orphan, or that his father was guilty of crimes deserving death, than that he himself deserved to lose his property? and must he not feel himself as deeply injured by the government, and inclined to revenge the death of his parent? but is he so *capable of taking that revenge* if he be deprived of property which his father's imprudence has forfeited?—Or is he so likely to commence the
execution

execution of his revenge, when he has still a *hope* left, that his *loyalty* and *good conduct* may induce the *restitution* of all, or at least part of the forfeiture?—A child will, if he has any reflection, feel, in my opinion, more respect for the memory of a father who has only been his *own* enemy, and suffered *alone*, than of a father who regardless of his family has involved his wife and offspring in the consequences of his crime; and such feeling will possibly restrain the son (if he has children of his own) from following an example which has proved so fatal to himself.

It is said, that the *rigorous* punishment of treason has not answered the end of its institution, for where have been so many treasons committed as in the British Isles; and that such rigour rather *tends* to *produce* the crime. —I am far from being the advocate of *severe* punishment, but surely we must look to some other cause for the growth of our domestic treasons.—For in *China*, where the punishment

ment of the traitor is shocking* to humanity, treasons do not abound.

To the arguments already used in favour of forfeiture may be added, that thereby it is made the *interest* of a man's family and relations to watch over him, and endeavour to deter him from entering into treasonous conspiracies, into which he cannot well enter without *exciting their suspicions*.

It has been used as an argument against forfeiture of lands, that as it relates *back* to the time of the treason committed, and avoids all intermediate alienations of the offender's property between the treason and attainder, it often falls heavy on *innocent* purchasers.— I admit that the forfeiture relates to the time
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* In consequence of the sentence for treason by the Chinese law, the executioner having first tied the traitor to a stake, tears the skin of his forehead and head, and lets it hang over his eyes, to prevent, as some imagine, his seeing how dreadfully the rest of his body is to be mangled; the executioner next flashes the other parts with a kind of cutlafs, till he has cut almost all his flesh in pieces, and then abandons him to the cruelty of the gazing populace.

of the treason committed as laid in the indictment.—But, there must be *some* point of time at which the forfeiture begins, and what so proper as that of the treason committed? If the time of either indictment, judgment, or conviction were made the point, a traitor by conveyance after discovery of his crime when arrested, during trial, or after conviction, might defeat the law's provision—a similar relation back is provided by the bankrupt law, which in several instances avoids conveyances by the bankrupt, from the time of an act of bankruptcy committed by him: And the salutary effect of such provisions in these several cases must naturally be, to make the person taking the conveyance look narrowly into the *loyalty* and *manner of life* of the *grantor* in the one case, and into the *credit* and *dealing* of the *trader* in the other.—This however is to be remarked, as in favour of him who has purchased from a traitor after the crime committed, that the mesne profits of the lands, like the traitor's personal goods, are only forfeited

feited from the time of the *judgment* pronounced against him.

I have not undertaken herein to enter *at large* into a detailed vindication of the law of forfeiture for treason, but have merely set forth such reasons as appear to me most cogent and *convincing*, and have endeavoured to answer such arguments *only* against its propriety, as seem to me most worthy of notice:—and, as I have endeavoured to place its defence principally on the grounds of terror and *example*, I have not thought it necessary to enlarge on the advantages arising from confiscation to the state itself, or to loyal persons, whose properties having suffered by the treason, might from such forfeiture be retributed for the injuries they had sustained.

As to the act of the *English* parliament, 7th Anne, c. 21. providing that, after the decease of the then pretender to the crown, no attainder for treason should disinherit the heir of the traitor, nor forfeit more than the

traitor's life interest, the history of it is sufficiently known.—It was enacted, shortly after the *union*, to adjust a point left then undetermined, and to satisfy the *Scottish* nation, which struggled greatly to preserve its *talzies* from English attainder, and passed much against the inclination of the house of *Lords*, some of whose members then best understood the nature of the British constitution ; and so sensible was the English legislature of the impropriety they had formerly committed in passing that act, that in a few years afterwards, by 17 Geo. 2d. c. 39, it was enacted, (though a kind of fraud on the Scotch) that such exemption from forfeiture should be *postponed* till after the deaths of the *sons* of the late Pretender ; and it is not difficult to foresee that such event will not be suffered to terminate the law of forfeiture.—If it shall be so suffered, the consequence must be that the inferior crime of *felony* is entitled to freedom from attainder.—But, it is some satisfaction for this *nation* to reflect, that the question of the propriety of forfeiture for treason

treason is still open to the *Irish* legislature; and that it is not, like that of the sister kingdom, imprudently *committed* to abolish salutary restraints on the crime of treason, which, if once withdrawn, cannot be so easily re-established.

I shall now conclude this part of my observations on the utility of attainder for treason, so far as it works a forfeiture, with the opinion of one of the ablest writers on the subject of the penal law, “ that forfeiture is
 “ one of our best constitutional safeguards
 “ when applied with discretion to the pre-
 “ servation of moral conduct, and used with-
 “ out violence to the correction of guilt,
 “ and that therefore this branch of the penal
 “ system should not be suffered to fall from
 “ the body of the English law, without se-
 “ rious consideration.”*

I now recur to the second consideration, to which the public attention should be
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* Principles of Penal Law.

drawn, as more immediately applicable to the *present* parliamentary proceedings, namely, whether the Legislature can *with justice* attain persons who have died untainted.

It has been observed in part, that attainders by *Parliament*, and those by common course of law, are equally the consequence of *judgments*, with this difference, that one is the *ordinary* judgment of the *usual* tribunal, the other, the *extraordinary* judgment of the *whole Legislature* acting in a *judicial* capacity.

A bill of attainder may be not improperly styled a *parliamentary judgment*, particularly where, as in the present case, it proceeds *not* to enact a *new treason*, not to inflict a *new* species of *punishment*, but merely to *try* the offender by an *extraordinary* instead of the ordinary tribunal.

There is no doubt that the Legislature has the *power* of passing such bills in every instance ;

instance ; without such a power any government would be imperfect, and want sufficient force to *preserve* itself on extraordinary occasions ; but still, that power is entrusted to the Legislature by the people to be exerted with reason and *justice*. The usual laws and mode of trial, are to be employed in *ordinary* times, and for *ordinary* offenders, but there are seasons when the Legislature is called on to break *through* a particular rule of law, or to go *beyond* it. When *Cethegus* had raised a rebel army about to lay Rome in ashes, it was long debated in the Senate, whether the *Porcian* law, forbidding the *execution* of a Roman citizen should be infringed—it was so—the state was saved—and *Cethegus* and the other associates of *Catiline* were speedily cuted.

The common objection to bills of attainder in general is, that they are judgments *ex post facto*, whereby a man is punished for actions which he had every reason to think himself *safe* in committing, they not being
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within the *prescribed* extent of the specific laws. That objection may possibly hold in cases of actions committed which are *not evil in themselves*, but would only become so by human *prohibition*; but can never hold in its full extent with regard to actions, which the natural reason and inherent feeling of man *in society* would teach him he ought not to commit. A case has been put by a writer* on a branch of this subject. “It is
 “not treason within the twenty-fifth of
 “Edward the third, to set fire to one of the
 “King’s ships, yet could any one think it
 “unjust that Parliament should attain a
 “man of treason, who should have wilfully
 “set fire to the whole Royal Navy?” I also may be permitted to put this case.—Suppose, that before the breaking out of the now expiring rebellion, and the consequent powers vested in the *military* officers, and particularly before the late statute against conspiracies to murder, the *printer, author, or publisher,*

* A Discourse on Treasons, and Bills of Attainder, (supposed by West.)

publisher, of that inhuman *placard* the *Union Star* had been apprehended and found guilty ; he could, in case his directions of murder had not been executed, have been only punished as for an aggravated *misdemeanour* by the existing law, and yet not many, even of those who appeared in *open* rebellion, could condemn *parliamentary* attainder inflicting *capital* punishment on such a *monster*.

In such cases, did not the power of annexing an adequate punishment to a *new* and extraordinary and *aggravated public* offence reside *somewhere* (and where could it justly exist but in the legislature?) the nefarious inventor of an unforeseen crime might, to be sure, have the *horrid reputation* of having occasioned a *new* law against *future* imitators of his villainy, but he himself would go unpunished. The extraordinary interposition of the legislature on such occasions is necessary : were it for no other reason than this, that it would discourage persons ingenious in their mode of *evading* the established laws from endeavouring

endeavouring to put in practice their shocking devices.

But, it is unnecessary for me to pursue further this method of reasoning, or to endeavour to shew the occasional utility and justice of such *ex post facto* laws.—I am not driven to contend for the doctrine I have laid down, in any thing like its full extent, in my observation on the *present* bill, it enacting not an *ex post facto* law, but merely inflicting a *posthumous* punishment for a crime already *expressly* forbidden, and which, by the existing laws, is the *unerring* consequence of that crime.—If there be nothing to impede the *ordinary course* of the law, or render the use of it *dangerous* to the *state* in any particular instance, and the accused person be *forthcoming* to answer his charge ; then the legislature should not in my opinion interfere, but leave him to be proceeded against in the *usual* course—but, as has been observed, there may exist cases “ *ense recidenda* ” calling aloud for parliamentary interference.

Every

Every case, in which such legislative interposition may be just, rests on its *own peculiar* circumstances ; and it is scarcely possible to lay down *general* rules for *particular* and *extraordinary* interference :—However, there are *two species* of bills of attainder which, as being in a great measure grounded on or corroborative of or ancillary to the *common law*, may in some degree be reducible to distinct *classes*.

Parliamentary attainder, for instance, seems clearly proper, first, in case the accused person be charged with having entered into a *treasonable conspiracy wide-spread* or *atrocious*, or into *open rebellion*, and *fly* from justice or *conceal himself* so as not to be brought forward to answer the charges against him, and do not surrender by the day appointed by the act for his coming in to abide his trial ; secondly, in case a person so charged has *died* before or during trial by the *common law*, or after conviction and before judgment, whereby he would have *escaped* the *attainder* of the com-

mon law, rendering him an *example* to after times.

Of the first class, was the act 12 Eliz. in Ireland c. 5. attaining the Earl of *Clancarty*, and others if they did not surrender by a day certain—as also the 8th Will. 3d in England in like manner *conditionally* attainting the *conspirators* in the *assassination plot*—and other like statutes too numerous to mention here, particularly those so lately passed in England, as the 19 Geo. 2. c. 26. in consequence of the *Scotch* rebellion.

That species of bills of attainder, being merely a *summary* mode of enforcing the appearance of the accused persons in order to their common law trial, and merely doing what process of outlawry, though by a mode *slower* and more easily *evaded* by legal *subtilities* could otherwise have done, and being like outlawry *avoidable* by the *appearance* of the party, and *not immediately* affecting the *life* of the party, has been so very *frequently* used,

used; that even that constitutional lawyer Lord C. J. Hale seems *hardly to notice it* as out of the *ordinary* mode of process.

I now come to the second class of bills, as applying directly to that now depending in parliament,—namely, those “attainting a party *after his death* who has *died unattainted*”—and under this head must be comprized all cases of death, before or during trial, or after conviction, and before judgment in the ordinary course, whether the offender shall have *died* in his treason or rebellion, been *slain* in the field resisting the King’s troops, or been *executed* in rebellion by the sentence of what is *improperly* called a *court martial*.

It may be seen, that, in all these cases, the common law *could not operate* on the traitor, by inflicting on him the terrible punishment of treason, either by *execution* on his body, *corruption* of his blood, or, even by *forfeiture* of his lands and goods, except in one or two instances hereafter mentioned.

It does not seem to have been the opinion of any *lawyer*, or the practice of the common law, at any period of its history, that judgment of attainder, so as to corrupt his inheritable blood, could have ever passed against a traitor after his death.—But, it appears, that by the most *ancient* practice and allowance of the common law, a man might incur a *forfeiture*, sometimes of his *lands*, and sometimes of his *goods*, *after his death*, although he had *not* been attainted in his lifetime. For in antient time, as my Lord C. J. *Hale* has observed, if a man had been *slain*, in *open war* against the King in *rebellion*, or died *adhering to the King's enemies*, the King did take a forfeiture of the offender's lands, sometimes by *presentment* in *eyre*, sometimes by *presentment* in the King's-Bench, and sometimes by *inquisition by the escheator*, an officer, whose place was formerly of great trust and employment, in the King's revenue, but now is only remarkable (at least in this kingdom) for being the resting place of members of the House of Commons, from
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the labours imposed on them by their constituents.

But the practice of such inquisitions by *escheators* in England, having become partly out of use in the reign of Edw. 3d, we find that in the 34th year of his reign, the commons complained, that, “ some of the
 “ escheators, by colour of their office, had
 “ then lately seized lands as forfeited for
 “ treason surmised in *dead persons*, who *never*
 “ *were attainted in their lives*” and accordingly by the stat. 34 Edw. 3. c. 12. such practice of the escheators was done away; but the King did by that statute, at the same time declare, that, “ because the King and his
 “ *progenitros* had been seized of the *forfeitures of wars of all times*, he would not
 “ exclude himself of such *right*, whereof he
 “ found his crown seized, but would *continue his right* of such forfeitures fallen in
 “ his time, and in the time of his father, as
 “ had been used: and that statute did enact,
 “ that in all cases of forfeiture for treason
 “ of

“ of *dead persons not attainted in their lives,*
 “ *their heirs nor land tenants,* should not be
 “ impeached or challenged for any forfeiture,
 “ *except the forfeitures in old time judged af-*
 “ *ter the death of the persons by presentment*
 “ *in eyre, or in the King's-Bench,* as of fe-
 “ *lons of themselves and others.*”

From that statute, it is to be collected,
 that, notwithstanding its enactment, no *alte-*
ration was made as to the King's being enti-
 tled, as *of old time,* to the *forfeitures of wars,*
 that is, to the lands and goods of persons
slain in open rebellion, provided presentment
 were made in *the King's-Bench* thereof:—
 But such *presentment* must have been by the
Chief Justice of the King's Bench (who is the
supreme coroner) in *person,** on *view of the*
body, of him killed in rebellion, made *of*
record, and returned into the court of King's
 Bench, as was resolved *after* the making of
 that

* 4th Rep: 57. (b) Case of the Warden and Commonalty of
 Sadlers.

that statute; and for want of such inquest held on the body of the celebrated *Jack Cade*, who was slain in *open* rebellion, it was found necessary to attaint him *after his death* in Parliament, by the 29th of Hen. 6. c. 1. Eng. which statute assigns the true reason of such bills of attainder, namely, “ *that though Cade*
 “ *was dead, yet by the law of the land he was*
 “ *not punished, and that the King, consider-*
 “ *ing the premises, to put such traitor's in*
 “ *fear in time coming and for the saving him-*
 “ *self and his realm, did, with the advice*
 “ *of his Parliament, attaint him.*”

That species of forfeiture after *view* and *inquest on the bodies* of traitors slain in battle, becoming *inconvenient*, and in most cases nearly impossible to be holden, *parliamentary attainder* was used to supply the place of it; and accordingly, numbers of persons *slain in rebellion* have been attainted by bill after *their deaths*, who were not previously *punished by the law of the land*, as has been seen in the
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case of *Jack Cade*, and will be shewn hereafter.

Another species of forfeiture *after the death of the offender*, though of his goods and chattels only, was practised by the *antient* law, and (according to L. C. J. Hale) *continues at this day*. If a traitor or felon *rescue* himself, or *will not submit to be arrested*, and *on resistance is slain*, upon presentment thereof he shall *forfeit his goods and chattels*. And this applies, it may be seen, to the case of one of the persons now about to be attainted in Parliament, (supposing him to have committed treason) with this *exaggerating* circumstance, that, in the present instance, the *officer of justice* making the arrest was *also killed* by the person charged with the treason.

Thus, it appears, that, even at the common law, forfeiture after the traitor's death, was created on *three* manner of presentments in case he *died in open war* against the King,
or

or in adhering to his enemies, or was slain in resisting the arrest of justice; and to these cases may be added, the forfeiture of a traitor's or felon's goods, where it was found after his death, that he fled from justice, and was killed in the flight, as also the forfeiture by a *felo de se*—one great reason (besides its inconvenience) why forfeiture, on the record of slain in open rebellion, came to be in general disused was, that it was possible a man might be there against his will; but that can be no reason against parliamentary forfeiture for such cause, if it appear in proof that the rebel acted with his own consent.

Bills of attainder then, in the several cases where a traitor has died or been slain in open rebellion, under which is meant not only those who died in the field, but those put to death by the commander of the King's forces, seem but to follow the common law, and to be corroborative of, and ancillary to it, in forfeiting the lands of the traitor; and, in the case of a traitor killed in resisting the process

of the law, which induces confiscation of goods and chattels, seem to go but a *little* way *beyond* the ordinary rule, in forfeiting his *real* estate.

I do not by any means intend to say, whether the objects of the present bill have been guilty of treason or not, it being a matter now in the consideration of Parliament ; but, supposing such guilt, the Commons seem not to have done amiss in approving the principle of the bill.

I know it is common for writers, such as seem to consider every restraint and punishment of treason, as so many injuries done to themselves, to cry out against such bills of attainder, as attacks on the constitution, and as affording bad precedents ; but *extraordinary* precedents can never well be applied to *ordinary* cases ; and, if attention be paid to the *principle* of such bills as the present, it will be found that the Legislature in their enactment does not so much pass *new* laws as
act

act *judicially* against the offender, hearing evidence for and against him, applying it to the *established* law of treason, and awarding thereon *established* punishment ; and that the only *innovation* is, that Parliament in some cases acts instead of an *inquest* or *presentment*, and in others merely takes up what the common law had or must have begun and would have *finished*, but for the *premature death* of the offender.

The grand objection to an *ex post facto* law is, as has been observed, that it punishes for actions which the doer of them did not know from the *existing* laws to be criminal, or to merit a particular punishment : but does the *present* bill proceed against such persons (presuming them to have acted as they are supposed to have done ?) did not they, and does not every man in the community know, that to lead, or *voluntarily* accompany, or take measures to raise a *rebel* army for the purposes of overturning the Government, is

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treason, and that its punishment is death and attainder ?

It may be said, that by the *death* of the offender before judgment he is, as it were, *withdrawn* from the cognizance of *human* tribunals, and that therefore it is unjust in the Legislature to follow him to his grave ; that his property has *vested* by his death in his real or personal representatives which it is *unjust* to *devest* from their possession who are *innocent* of his crimes.

But, if *example* be one of the principal ends of *punishment* (as seems to be acknowledged) and *punishment* the consequence of crimes, surely such a traitor should not, in justice to *others* or the state, be suffered to *steal silently* out of the world without being made a *dreadful example*. In order to that *example*, he must have *solemn judgment* given against him, and should that judgment be *less heavy* than would be pronounced were he *living* to hear it ? The law is not satisfied,
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in cases of treason, by the award of execution against his *body*, there remains behind a judgment of *posthumous* punishment which the court of common law in such cases always awards ;—it has been shewn that, *except* in few instances, the *common law* cannot reach the traitor if he *die before* judgment—although then the law should lose hold of the offender, although by his death he is not *punished*, as if judgment had been given in his life time, the Legislature notwithstanding, in a common case, should never interfere, but only where the treason has been *daring* or *enormous*, and participated with *many* conspirators ; then should it proceed, if satisfied of his guilt, to pronounce the *remaining* judgment of the *common law*, and make his *example* as *notorious* and *diffusive* as his treasons.

As to the *injustice* of *devesting* supposed rights of innocent persons ; that has, in part, been answered by the arguments in favour of the extension of the *forfeiture beyond the criminal*

minimal himself; but the *technical* part of the objection is worthy of notice. It is idle to suppose that so great a *national* question is to be looked at in a point of view merely *technical*, and not placed on the *broad basis* of *public policy*, which in numberless instances authorizes the destruction even of a *vested* right either for the *present safety* of the state or for *future example*. Taking it even in a *technical* view—it has been observed, that the *transmission* and *vesting* of property have arisen by *sufferance* of *civil society*, and been governed by its rules, in contradistinction to any *natural* right, and therefore the heirs or kin of such persons can claim *merely* under the rules and allowance of the *laws of this country*. In these laws the cases are numerous indeed, where property vesting *after death*, has been divested by matter subsequent; and we have *already* instances before us, where both lands and chattels have been divested out of the representatives, for the crimes of the person they represent, by matter of *record found* or *presented subsequent* to such vesting. This

is no small impeachment of the *sacredness* of *vested rights*. The representatives of the criminal take the property *cum onere* subject to his *debts* and *defaults*, and why not also subject to the *consequences of his crimes*? a man having committed treason, and afterwards before judgment *alienating* his *real* estate in like manner, alienates it *cum onere*, liable to be *extended* for his judgment debts, and *sold* for his incumbrances, and also liable to *forfeiture* for his *precedent* treason, though judgment be given against him *after* the conveyance, and the estates *vesting* in the *alienee*—can then the heir have a *greater* equity than a *purchaser* for *valuable consideration* without previous notice of the treason? Were it once established that the criminal's death should in every case disable even the legislature from with justice inflicting the remaining common law punishment, great would be the encouragement held out to *self murder*. I have given already a *Roman* example of *suicide* to save a forfeiture, *Jackson* is a recent instance nearer home—a *felo de se* forfeits as has been said, his
 goods

goods and chattels ; and shall the *merit of voluntarily* incurring by an *additional* crime that *forfeiture*, which his treason *itself* would have induced, prevent that confiscation of his *real* estate, which the law intended as a *punishment* for his *previous* guilt ?

Having thus, I hope, answered the most material objections to *bills of attainder in general*, and shewn their propriety in many instances, particularly where they are merely *grounded on*, and *supplementary* to the *common law*, as in the present case—I shall, before I proceed to mention more particularly the cases of the three gentlemen before mentioned, lay before the public several *precedents* of bills of attainder *exactly* of the *second* species I have treated of, being precedents of attainders *after death of the traitor*, who, though in some instances slain in rebellion either in *actual* battle, or *after* by the conquering general, yet was not (as the statute attainting Cade expresses it) *punished by the law of the land*. That attainder of Cade was expressly

prelsly within the species of parliamentary attainder I have endeavoured to support.

The *earliest* mode of attainting in Parliament was not by *bill*, but, on *indictment* found and returned into Parliament, judgment of attainder was pronounced; but bills became in time the usual form, and to them, when introduced, was the party to make his defence, as was practised in the well known case of *Sir John Fenwick*, 8th Wm. 3.

I pass over the attainders of *Richard the third*,* and his adherents *after their deaths* in the first Parliament of Henry the seventh, they not being to be considered as *rebels* or *traitors*, as also the *alternate* attainders of the *York* and *Lancastrian* adherents; for I have not found myself *authorized* to make use of the transactions of those *unquiet* times as precedents, when the government was continually changing, when Parliaments thought

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* Lord Bacon's Hist. Hen. 7th, p. 7. folio.

more of battle than debate, and when, if one chanced to be summoned, it was wholly composed of the adherents of one party, and summoned chiefly to attain those of the other.

Of this nature was the Parliament of *Conventry*, in 1460, wherein many attainders passed, but all its acts were afterwards reversed by 39 Hen. 6th c. 1. Eng. as having been irregularly constituted, and seeking only forfeitures and blood.

I also omit taking notice of the precedents in the reigns of *Richard the second*, and *Henry the eighth*, in *England*, and of *James the second* in *Ireland*, none of those reigns shewing any great regard for even the formalities of law.

I cannot find any *direct* parliamentary attainders in the English Parliament during the reign of Elizabeth, but there are several precedents of acts in *confirmation* of the attainders

tainders of divers persons, such as 13 Eliz. *confirming* the attainders of the Earl of Westmoreland and others for open rebellion in the North, and the 20 Eliz. *re-attainting* the Lord Paget and others, who had been *outlawed* for treason, and thereby *devesting the right* of the representatives of such persons to *reverse* such outlawries for *error* at common law. But in the third year of James the first in England, a statute was made, c. 2. attainting Robert Catesby, and three others, concerned in the *gun-powder plot*, who had been before *slain in open rebellion*, as that act recites ;—and also attainting for the same crime one *Tresham*, who died *during* his imprisonment, and before indictment.

The next in order is the stat. 12 Car. 2: c. 30. attainting *Cromwell*, Ireton, Bradshaw, and Pride, *after their deaths* for their well known treason to King Charles the first.

One would naturally expect to find precedents of attainder *after death* at the time of

the Scotch rebellion, but I can find none ; the reason probably may be, that as most of the *chief* persons* concerned were attainted in *their lives* unless they surrendered by a certain time, and others were tried in *England* in consequence of a special act, it was thought *immaterial* to attain *inferior* persons who had suffered death in battle.

I come now to remark on the *Irish* acts attainting dead persons, which will be found more in number and more in *point* to the present consideration than those passed in *England*.

The first Irish parliamentary attainder, to be found in the statute book, was that of *Gerald Fitzgerald* Earl of *Kildare* after his death (and others) for treason and in company with one *O'Connor* besieging the *Castle of Dublin* 28th H. 8. c. 1.

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* 19 Geo. 2. c. 26 Eng.

The next was the 11th Eliz. sess. 3. c. 1. for attainting the celebrated *Shane O'Neil*, whereby great part of *Ulster* became forfeited to the crown; and this attainder was after *his death*, and cannot be impeached in any wise, being the principal foundation of the *settlement* of that province.

In the next year of Eliz. 12 Eliz. sess. 2. c. 1. we find *Thomas Queverford* attainted *after his death* for being a principal in the then late rebellion—and the reason given in the statute for his attainder was, “ that, if his
 “ most cruel and traiterous doings should be
 “ left *unpunished*, there would remain a peri-
 “ lous *example* for others thereafter to do the
 “ like.”

In 13th Eliz. c. 3. *John Fitzgerald* called the *White Knight* was also attainted *after death* for the same conspiracy, and similar reasons were assigned for his attainder—and it is to be observed that all these attainders were carried on *coolly* and *deliberately*, as may appear from
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the *careful* penning of the several statutes which usually recited the evidence of the treason, and were made, not with a view merely to forfeitures, but example, as may be seen by the blood and estates of several of the attainted persons being restored to their loyal posterity.

With similar deliberation was a bill of attainder passed in the 27th year of Eliz. c. 1. against the Viscount *Baltinglas*, then *lately deceased* and others, some for *open rebellion*, and others for *conspiracy*—and it should be particularly observed, that the second section of that act *extends the attainder* expressly to all such other persons, “ who by actual rebellion
 “ on and other traitorous practices had committed like treason with Lord *Baltinglas*,
 “ and *had died or been slain in their said actual rebellion and treason*, or otherwise had
 “ been by *martial law executed for the same*,” and vests their lands and goods in the Queen without office found. And it is singular, that the very next statute to that seemingly
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severe one is made for the *restitution in blood* of one *Delahide* who had been formerly attainted in Parliament.

In the 28th Eliz. c. 7. the Earl of *Desmond* was attainted after his death.

And in the next following chapter of the same year a statute was passed reciting the treasons of divers by name, and also reciting, “ that divers others who joined in the rebellion and treason had *died and been slain* “ in their actual rebellion and treason or “ otherwise had *been by martial law* executed “ for the same,” and attainting the said traitors by name, as also all others who had joined them, and had *died, or been slain, or executed by martial law*, as aforesaid. And it is here also observable, that the very next chapter contains an act restoring the blood of the wife of one *Nicholas Taafé* whose father had been before attainted.

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By the 11th, 12th and 13th James first, c. 4. Sir Cadir O'Dogherty, and Brian M'Mahown, Sir Hugh M'Guire of Enniskillen, and others who had been *slain in open rebellion*, were attainted:—although the first section of that statute seems to consider the *inquisitions of record* in Chancery *finding* the deaths of those persons in open rebellion, as of *themselves* working *the attainder* of the parties, and merely purports to *confirm* the attainders thereby created, yet the next section does not appear to have *trusted* to the force of such records (not being most probably of inquisitions before the *C. J. of the King's Bench* on *view* of the bodies) but proceeds to *directly enact* their attainders.

The next period in which we are to search for precedents of such attainders, is, at the time of the Irish Rebellion, in 1641—but from the 13th of Charles the first, in the year 1639, to the 15th Charles the second, in 1660, there is a chasm in our statute-book. However, we may from the *history* of
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of the times collect, that the attainders, during such rebellion, in Parliament were few, or none—and yet I shall be told, (and told truly) that many of the rebels were then tried and executed by *martial law*—and that several others must have died in the field. But the fact is, that such military execution, from what cause I cannot authentically discover, fell almost entirely on those of the *poorer* sort, and such as had little or no *freehold land*. *Carte*, in his life of the *Duke of Ormond*,* affirms, that such distinction was *purposely* made by the *Lords Justices*; but in that opinion he seems little deserving of credit, it being evidently his *inclination* and design by *depressing their* character, to *raise* that of the *duke*, his *hero*. It appears, that such of the lords and gentlemen of estate, (of which there was no small number) as were in custody and could be proved traitors, were tried by the ordinary courts; and that others were indicted in their *absence* and outlawed, amongst whom were some not at all con-

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* P. 278. Lib. 3.

cerned in the rebellion, and this may account for there being then few or no attainders in Parliament, for it is not to be supposed that the *Lords Justices* who, (according to Carte,) could strain the *ordinary* process of the law, to the injury of individuals afterwards *relieved* by the *savings* in the acts of settlement, would abstain from *bills of attainder* as *un-constitutional*.

We are next, to search for precedents in the reign of William the third; and there no bills attainting any *particular* persons by *name*, are to be found.—But the ninth Wm. 3. c. 5. which, it is to be noticed, although it recites the kingdom *to be settled in peace*, by the first section enacted, that the attainders of any person for High Treason, not reversed or pardoned before the 27th day of July, 1697, except of those comprehended within the articles of Limerick, or Galway, should not be reversed for any *error, insufficiency, or other defect in form or matter*: This statute was made in the reign of a
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constitutional monarch, and yet it took away, (wisely I presume) from the representatives of attainted persons, the right *vested* in them by the law of bringing *error* to reverse the attainders of their ancestors. But this is not all; the second section makes a *sweeping* attaint of *dead* persons *not attainted in their lives*, by enacting, “ that every person (of a certain class,) that had been guilty of the then
 “ late rebellion against his majesty, and her
 “ late Majesty the Queen, and who by any
 “ *inquisition already* taken by the oaths of
 “ twelve men, and returned or *shall be* taken
 “ and returned *within two years*, from the
 “ 1st day of September, 1697, hath, have,
 “ or *shall be* found to *have died, or been slain*
 “ in their said actual rebellion, before the
 “ 3d day of October, 1691, should be convicted and *attainted* of High Treason;” and by the 5th section, the chancellor was directed to issue commissions to the escheators, to hold the inquisitions to be taken after the act, and by the sixth, traverse was given of such future inquisitions, but

I can find no traverse allowed of those that *were before* had and returned.

It is further remarkable, that the said statute was passed, so long as *six* years, after the committal of the treason it meant to punish; during which interval the traitors' property must have been *vested* in their representatives: After the reign of *William the 3d.* we need not search for Irish precedents.

I do not mean to say, that *precedents*, even such as were formed in *constitutional* and *settled* times, are to govern *us*, any farther than as they are agreeable to *reason* and *justice*; but I do not agree with those, who finding, that *one* or *two* bills of attainder may have *formerly* passed without sufficient foundation, conclude that the very *power itself* is naturally *unjust*; and, as if there were no other way of remedying the abuse of a *necessary* and *useful* legislative exertion but by taking it entirely away, set themselves not to correct, but to destroy. The precedents I have cited, appear,

pear, if my observations have had any weight, to have been founded on *law* and *reason*, and to have been merely *supplementary* to the *common law*, which by the offender's death is, as it were, *defrauded* of its *rights*.

It has been objected to the principle of the present bill, that it favours of *revenge*; but that imputation seems not reconcileable to the *mild* and *merciful* conduct observed by the present government towards the numerous rebels put into its power, by *conquest*, or *discretionary surrender*.

It appears to be the object of government, that the property of these gentlemen, if forfeited, should be applied *not* even to the ordinary uses of the *Treasury*, but, to make reasonable *retribution* to the *suffering loyalists*.

I must once more deprecate the idea of being supposed to make any remark or give any opinion on the *guilt* or *innocence* of those gentlemen: Such conduct would not be just to
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their relations, respectful to the House of Commons, or agreeable to my own feelings; but this I may *properly* observe, that, *supposing* them guilty of treason, the *principle* of the present bill exactly applies to their several cases.

One of them, it is said, has, in *resisting* a lawful arrest, *slain* the *officer of justice*; and such unlawful resistance has caused the death, not only of the officer, but of the person arrested.—The prisoner being *killed in his resistance*, would on *presentment after his death* have *forfeited*, as has been observed, his *goods and chattels*.—His conviction for the *wilful* death of the officer, would have induced a forfeiture of a *higher* nature.—Had he been convicted of *treason*, the forfeiture would have gone still *higher*, so as to confiscate his lands and tenements *for ever*.—How then, has he escaped such terrible and lasting punishment for those treasons, I *now presume* him to have committed? merely, if report speak true, by his *own unlawful* act, causing his own death
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and that of the officer, and inducing a *double forfeiture*.—And shall it be said, that a criminal, charged with an offence of the *highest* nature causing *forfeiture* and *corruption* of his inheritable blood, shall by *voluntarily super-adding* to that offence, others of nearly equal magnitude inducing nearly equal forfeitures, and one of them corruption of blood, escape the punishment inflicted on others, he is charged with having *seduced*, and not even be rendered useful to *society* by his *example*; or shall his heirs make their *advantage* of the crimes of their ancestor? Does the present bill (*supposing* his guilt) enact a *new* punishment against him? Does it make a *new law* in pronouncing the excitement of rebellion to be *treason*? What does it do more, than take up the charge against him where the courts of *common law* were stopped in their progress, by an event occasioned, it is said, by his own *unlawful* act, on which even the ordinary law could inflict some degree of *posthumous* punishment?

As to the *two* remaining gentlemen who having been, as reported, taken in their flight from the field of battle, have been executed by the *order* of the King's *general*, or in other words, *slain in rebellion*; their cases, supposing their *treason* to have been as *represented*, come *exactly* within the precedents I have mentioned, and within the *principle* of the *common law*, inflicting as has been said, on persons under *similar* circumstances, forfeiture *after their deaths*:—and in such cases the present bill exceeds but by a small degree that *ancient posthumous* punishment, by superadding to it the *other* consequence of attainder, which follows *judgment* of conviction against a *living person*.

It has been imagined by some, that, for Parliament to proceed to attainder, after execution by, what they call, sentence of a *court martial*, may induce a clashing of jurisdictions; for, that if the legislature do not consider such sentence as *conclusive evidence* of the party's guilt, it may *now* perhaps pronounce
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those persons *innocent*, who were executed for supposed treason, which would be of ill consequence indeed; and that, on the other hand, it is unjust to receive as *conclusive*, a sentence given after a trial, ousting a prisoner of his common law privileges, by challenge of Jurors, and the like. But, the Speaker of the House of Commons, has, with his *usual clearness* of conception, taken the *true* distinction between the *late* proceedings and those by *courts martial*.—*Courts martial* are such as are held in consequence of the *mutiny* acts, for *military* crimes, upon *military* persons, serving *under* his Majesty—and in such case their sentences, being under authority of *Parliament*, are held to be *conclusive* upon the same matter in all courts in this kingdom, as against the *King*, or the *prisoner*.—But, the execution of those gentlemen was merely under an authority delegated by the crown to one of its *generals*, vesting a *discretionary* power in him to execute what is called *martial law*, against all persons, even those *not* serving in the King's armies.—Such power

the constitution has vested in the King, for its own preservation, to be used only in *extraordinary* emergencies, in cases of *invasion* from abroad, or *rebellion* from within. For in either of these cases, if *summary* execution were not to be administered, but the offenders *detained* until the return of *peaceable* times; the success of the *invading* or *rebel* army might effect the prisoners release; and even the *incapacity* of inflicting such *summary* punishment, might retard the return of peace, and strengthen the army of the enemy or rebel, who by not being *cramped* with such *legal scruples*, would meet with a more *ready* assistance. It has been held, that such law cannot be legally enforced, in time of *peace*, without authority of Parliament; and *time of peace* is described to be, when the King's courts are open as *usual*, and offenders as *readily* brought to trial, and when the King's *writs* can be executed without interruption. The late tempestuous season did not surely answer that description—when the very safety of the nation depended on dispensing with
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the tedious process of the common law, and executing offenders with *speed, summarily* on the *scene* of their treasons. Those gentlemen then were executed in such a season by the *general's authority*, who might have done instant execution on them with his own hand, and was not bound to hold respecting them any *inquest or consultation of his officers*, but who *humanely and prudently* did so, in *ease* of his *own conscience*, and in aid of his *private judgment*; but such consultation or inquest of officers does not in any degree assimilate with the *true idea of a court martial*, properly so called, which is the creature of the *civil law*, and derives its origin from the court of the *Constable and Marshall*.

It has been imagined by *others* on a *slight* review of the arguments used by several lawyers in the English House of Commons, as reported in the 3d Vol. of *Rushworth's Collections* (*appendix p. 78*) that those great men in debating the power of the Crown to issue, in *time of peace, commissions* for the trial of offenders,

ders, not *military*, by *martial law*—(of the illegality of which there could be no doubt) have given their opinions, that a man *taken* in rebellion could not be *lawfully* executed by that law ; and that such law was unconstitutional, at a time when the King's Courts of common law *were open*, that being to be considered as *time of peace*, although the *King's writs* were *interrupted in their execution*. But supposing, even for a moment, that the opinion of any lawyer, let his abilities be ever so great, delivered by him as a parliamentary *partisan*, could have any weight, it will appear that those lawyers, after having all agreed, that the use of martial law in times of *war* or *great necessity* is justifiable, seem to consider the free execution of the King's writs being possible to be enforced by the Sheriff with the *posse comitatus* merely, as *essential*, in *addition* to the King's superior Courts being *open*, to constitute time of *peace* ; and *Roll*, afterwards *Chief Justice*, and the least prejudiced of any, gives it as his opinion, that, tho' such Courts being *open* may constitute what is *generally* through the *whole* kingdom stiled
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time of peace ; yet that if *war* (under which is comprised *open rebellion*) be in *any* part of the kingdom, so that the Sheriff cannot execute the King's writ, *there* it is not time of peace. And *Noy*, another eminent counsel, instanced the reign of Henry 3d. when from the time of the battle of *Lewes* to the battle of *Evesham* the courts were open, and yet in legal judgment that was not time of peace, so as that during it any right should be displaced.—*Roll*, also, further gave it as his opinion, that if a subject be *taken* in open rebellion, and be *not slain in time of rebellion*, he should be tried by the common law, and not by the law martial ; and that expression has been so strangely misrepresented, as to make him say that such prisoner being once taken could not be *afterwards* tried by martial law ; when the real meaning of it is, that if such captive be taken and not slain in the rebellion, namely, if he be *kept prisoner* till the *return of peace*, and be not slain after being *taken, during the unquiet times*, he should not be tried *after the return of peace* by a law,
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made only for *such* times—*ex necessitate rei*.—And that is the plain meaning of all the Lawyers.—But, as I said, such opinions are of no *authority*, being given by them as members of the House of Commons *merely*, and particularly, when it is considered, that the subject of the debate was the enforcing of martial law by *commission*, and did not relate to that *inherent exercise* of the crown's *prerogative* in times of danger, which may be delegated to the King's generals, by *verbal* instructions *merely*. It requires little observation to shew, as has been said, that the times, wherein the two gentlemen I have alluded to were executed, were not such times *of peace* as those described in such debates so to be—and it is a matter of doubt whether the King's writ could *yet* be *safely* executed in the Co. of *Wexford*.—I should not have mentioned such opinions, but for the wrong interpretation put on them by others.

It is also necessary for me to take notice of some cases, wherein judgments by *martial* law
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against those *taken* in battle and afterwards executed, have been *reversed*; but those were judgments as if given by the *Marshal's Court*, and made up of *record*, and purporting to work *forfeitures*; and were properly reversed, as not being in fact judgments *displacing* or *binding* any *civil right*, or working any *attainder*, and being of no other use than merely as *monuments* of facts.

That *quasi sentence* then of the general of an army, can never *conclude* as to the guilt of the person executed, nor can the Parliament, by not passing the present bill so as to attain such executed person, be construed to pronounce a *censure* on the act of the General; his opinion and that of the legislature are not *ad idem*; it is *one* thing to say that the offender deserved death, and *another*, that his treason was so enormous and so much *above* the *usual* class, as to call for the *extraordinary* sentence of the *whole legislature*. A man *joining rebels in arms* may deserve death, but it does not follow that *he led* or *originated* the
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the rebellion, so as to merit *parliamentary attainder*.

As to the opinion of those who have endeavoured to save by this bill the corruption of blood of the attainted persons ; *that* must depend on the merits of their respective *heirs*. If the heir of any one of them be a *loyal* subject, such as if this bill had passed would be entitled to *restitution* of his blood ; it seems he may now claim to have a *saving* inserted of the corruption of the blood of his *ancestor*. If he be such a person as would have, from the same reasons, a claim to the *restoration of the forfeited land*, that may be cause against attainting the person from whom he would derive, or rather, for the crown's *re-granting* it to him, *after* attainder for the sake of *public* example. The widows also of some of the attainted persons, may be entitled to consideration.

It has been said, that the government having *already* resorted to the *military* execution
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of those gentlemen, should not now *apply* to Parliament to attain them. But, that is a *strange* argument; as if the *parliamentary* punishment of such persons *after their deaths*, were a *private gratification* to those at the head of affairs, and not, as if their object were, as it can only be, the *future safety* of the state by *present example*. The late government was not *usually* consulted by the Generals of districts, *before* their execution of persons by *martial law*, nor was the sentence of what is called the court martial *reviewed* by the Lord Lieutenant, but, by the *Generals of districts*; but, even were such *executions* the *immediate* acts of government, the law officers of the crown, so far from arguing that Parliament should be concluded by such sentences, have *constitutionally* gone into *original* evidence of the treason of the persons accused.

I have declined, for obvious reasons, remarking on the evidence against any of those gentlemen, or how far such sentences, of

what have been called *courts martial* should have weight, but have confined myself to the *legal principle* of the bill; leaving to abler persons such other considerations, in confidence that Parliament, in its prudent framing of the bill depending, will deserve the eulogium pronounced by *Lord Bacon** on one introduced under the auspices of *Henry the 7th* against his *greatest enemies*, “ that there-
 “ in were contained, many just and tempe-
 “ rate clauses, savings, and provisoes, well
 “ shewing and foretokening the wisdom,
 “ stay, and moderation of the King’s spirit
 “ of government.”

* Bac. Hist. Hen. 7. p. 7. foli.



F I N I S.

